IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	**No. 23541-6-III**
	)	**(consolidated with**
Respondent,	)	**No. 24631-1-III)**
	)	
v.	)	
	)	
JAMES ANTHONY STINSON,	)	**Division Three**
	)	
Appellant.	)	
	)	
In the Matter of the Personal Restraint Petition of:	)	
	)	
JAMES ANTHONY STINSON,	)	
	)	**UNPUBLISHED OPINION**
Petitioner.	)	
	)	

SCHULTHEIS, J. — James Stinson was convicted in a jury trial of delivery of a controlled substance within 1,000 feet of a school bus route stop. Former RCW 69.50.401(a) (1998); former RCW 69.50.435(a) (1997). On appeal, he contends the prosecutor improperly elicited profile evidence and opinion testimony on the veracity of the witnesses. Pro se, he challenges the sufficiency of the arrest warrant and the basis for

the school zone enhancement. His consolidated personal restraint petition raises multiple additional issues regarding his offender score and sentence. Because we find no error, we affirm his conviction and dismiss the personal restraint petition.

Facts

On February 2, 2004, and again on February 4, confidential informant Raymond Brown made controlled purchases of cocaine at a gas station and at a restaurant during a drug investigation by the Spokane County sheriff's office. According to Mr. Brown, on each occasion he was contacted by Mr. Stinson, who arranged to meet him and sold him crack cocaine. Before each purchase, deputies searched Mr. Brown and gave him $40 for the sale. The deputies then kept Mr. Brown under constant surveillance while he traveled to the sale sites, made the transactions, and returned to the deputies with the cocaine. Mr. Brown reported that he made each purchase from Mr. Stinson, who rode as the front passenger in two different cars on the two occasions.

Mr. Stinson was arrested and charged by amended information with two counts of the delivery of a controlled substance: cocaine. Former RCW 69.50.401(a). Each count additionally alleged that the delivery took place within 1,000 feet of a school bus route stop. Former RCW 69.50.435(a).

At trial, the prosecutor asked Mr. Brown and various deputies about criminal activities at King's Trailer Park and the adjacent Maple Tree Motel, both located on the

east side of Spokane. Mr. Brown had lived in King's Trailer Park and Mr. Stinson had lived with him for about six weeks in late 2003. Mr. Brown admitted that he used cocaine, as did many people in the trailer park. He described some of these people as drug sellers and prostitutes. According to Mr. Brown, he was evicted from the park because Mr. Stinson sold cocaine from the trailer while he lived with Mr. Brown. Some of the deputies testified that they had investigated drug sales, prostitution, and vehicle prowls at the trailer park and motel. Defense counsel made no objection to the prosecutor's questions about criminal activities in those areas. Mr. Stinson took the stand and testified that although he admitted using cocaine, he was not involved in either of the transactions at issue.

The jury reached a verdict of guilty on count I, relating to the drug sale on February 2, and not guilty on count II, relating to the drug sale on February 4. By special verdict, the jury found that count I was committed within 1,000 feet of a school bus route stop. Using an offender score of 10.5 and a 24-month school zone enhancement, the trial court sentenced Mr. Stinson to 132 months of incarceration. This appeal and personal restraint petition followed.

Prosecutorial Misconduct

Mr. Stinson first raises the issue of prosecutorial misconduct. He contends the prosecutor improperly elicited opinions on the high crime rate in Mr. Stinson's

neighborhood and on the honesty of two witnesses. To justify reversal for prosecutorial misconduct, the defendant must show that the prosecutor's conduct was improper and that there was a substantial likelihood that the conduct affected the verdict. *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997); *State v. Hughes*, 118 Wn. App. 713, 727, 77 P.3d 681 (2003). The failure to make a timely objection and to request a curative instruction generally waives a claim of misconduct unless the prosecutor's conduct is so flagrant and ill intentioned that corrective instructions or admonitions to the jury could not neutralize its effect. *State v. Swan*, 114 Wn.2d 613, 661, 790 P.2d 610 (1990).

During the State's case in chief, the prosecutor asked Mr. Brown and three police witnesses about the people who frequented the Maple Tree Motel and King's Trailer Park. Mr. Brown stated that he lived in the trailer park, along with many "normal people" and people who sell controlled drugs or who are prostitutes. Report of Proceedings (RP) at 28. He admitted using cocaine and testified that Mr. Stinson sold cocaine while living in Mr. Brown's residence. The three testifying officers stated that they had investigated Mr. Stinson and others who frequented the trailer park or motel for controlled substances crimes, prostitution, and property crimes. During closing argument, the prosecutor stated that the police were investigating Mr. Stinson because they suspected him of illegal activities at the trailer park and motel, sites associated with prostitution and drug abuse. According to the prosecutor, Mr. Stinson liked the lifestyle

at the trailer park because he liked to get high. Although Mr. Stinson made no objection to any of this testimony or the closing argument, he now contends it constitutes improper profile evidence.

Generally, profile evidence that identifies a person as a member of a group more likely to commit the charged crime is inadmissible because it lacks probative value and is inherently prejudicial. *State v. Suarez-Bravo*, 72 Wn. App. 359, 365, 864 P.2d 426 (1994); *State v. Braham*, 67 Wn. App. 930, 936, 841 P.2d 785 (1992). If the prosecutor asked questions about the trailer park and the motel to create an inference that Mr. Stinson was more likely to sell controlled substances because he lived in a high crime area, the questions were inappropriate and improper. However, the record indicates the questions had a different purpose.

Mr. Stinson testified that he met Mr. Brown through a prostitute and decided to live with Mr. Brown because the trailer was a good place to get high. According to Mr. Stinson, everyone at the trailer park abused drugs, including the landlord. Defense counsel stated in closing that Mr. Stinson did not claim he was not involved in the drug underworld, but that he did not sell cocaine on the days in question. He further argued that Mr. Brown was more a part of that underworld than was Mr. Stinson, and asserted that Mr. Brown fabricated Mr. Stinson's involvement out of vengeance. In rebuttal, the prosecutor explained why police officers used a known drug abuser for the controlled

buys: "Swans don't swim in the sewer. So who do you send into the Maple Tree Motel and try and get rid of the drug dealers?" RP at 332. Because Mr. Brown shared the same friends, cars, and illegal drugs, the prosecutor continued, he was the obvious choice to gather the evidence for this case.

In the context of the entire trial, the prosecutor's questions about the criminal activities of the residents at the trailer park and motel serve more to explain Mr. Brown's involvement in the controlled buy than to create an inference that Mr. Stinson was a drug dealer. Mr. Stinson relied on this information to support his theory that Mr. Brown was the actual drug trafficker. Even if these questions were improper, they were not so flagrant and ill intentioned that a timely objection and an admonition to the jury could not have cured any prejudice. *Swan*, 114 Wn.2d at 661.

Mr. Stinson also contends the prosecutor engaged in misconduct by asking witnesses to give their opinions on whether other witnesses were lying. On the first of these occasions, a police witness described the process of sending Mr. Brown out to make the controlled buy and of observing Mr. Brown before, during, and after the buy. The officer stated that this process was necessary to make sure that the informant was reliable and truthful. Defense counsel objected when the prosecutor then asked whether the officer believed Mr. Brown was being truthful, and the objection was sustained. The second occasion of alleged misconduct occurred during cross-examination of Mr.

Stinson. When told that he had been overheard yelling threats to Mr. Brown at Geiger Corrections Center, Mr. Stinson denied knowing that Mr. Brown was at Geiger. The prosecutor then asked Mr. Stinson whether a witness testifying about those threats would be lying. Defense counsel's objection was sustained.

The credibility of a witness is a jury question. *State v. Whelchel*, 115 Wn.2d 708, 724, 801 P.2d 948 (1990); *Suarez-Bravo*, 72 Wn. App. at 365-66. When a prosecutor attempts to compel a witness to give an opinion on another witness's veracity, misconduct occurs. *State v. Jerrels*, 83 Wn. App. 503, 507, 925 P.2d 209 (1996); *Suarez-Bravo*, 72 Wn. App. at 366. The prosecutor's questions regarding the truthfulness of witnesses were improper. However, they were not prejudicial. Defense counsel's objections to these questions were sustained. The fact that defense counsel did not request a curative instruction or move for a mistrial suggests that the impropriety did not appear critically prejudicial. *Swan*, 114 Wn.2d at 661. Mr. Stinson fails to show prosecutorial misconduct.

Arrest Warrant

Pro se, Mr. Stinson next challenges the sufficiency of the affidavit supporting his arrest for delivery of a controlled substance. He contends the State failed to establish the reliability of the informant's information pursuant to the standards of *Spinelli v. United States*, 393 U.S. 410, 89 S. Ct. 584, 21 L. Ed. 2d 723 (1964) and *Aguilar v. Texas*, 378

U.S. 108, 84 S. Ct. 1509, 12 L. Ed. 2d 723 (1964).

A warrant for arrest must be based on probable cause to believe that the defendant committed the charged offense. CrR 2.2(a). When the facts supporting probable cause are supplied by a confidential informant, the officer's affidavit for a warrant must set forth (1) sufficient underlying information to allow the magistrate to evaluate the basis of the informant's knowledge (the basis of knowledge prong); and (2) the information that led the officer to conclude that the informant was credible and reliable (the veracity and reliability prong). *State v. Salinas*, 119 Wn.2d 192, 200, 829 P.2d 1068 (1992) (quoting *State v. Jackson*, 102 Wn.2d 432, 435, 688 P.2d 136 (1984), which adopted the *Aguilar-Spinelli* standard). If the informant's information fails one or both of the *Aguilar-Spinelli* prongs, independent police investigation may yet establish probable cause by corroborating missing elements. *Jackson*, 102 Wn.2d at 438. We review the magistrate's decision to issue a warrant for abuse of discretion, resolving doubts concerning probable cause in favor of issuing the warrant. *State v. Vickers*, 148 Wn.2d 91, 108-09, 59 P.3d 58 (2002).

The record does not contain the warrant for Mr. Stinson's arrest, but it does contain a statement of facts from the sheriff's office dated April 5, 2004 that indicates a warrant was requested on March 16. This statement refers to Mr. Brown as a confidential informant and describes in detail the controlled buy procedure. Mr. Stinson contends the

statement does not include enough information to show how the informant or the investigating officers determined the substance purchased was cocaine. On the contrary, the facts include descriptions of the substance as off-white chunks, and indicate that it field-tested as cocaine. These facts allowed the magistrate to independently conclude that the subject of the controlled buy was cocaine. Additionally, although the statement of facts does not indicate whether the confidential informant had a track record as a reliable informant, the police investigation during the controlled buy sufficiently corroborated the veracity of Mr. Brown's information.

In short, the information supplied in the statement of facts satisfies the two-prong *Aguilar-Spinelli* test. The magistrate did not abuse his or her discretion in issuing a warrant for the arrest of Mr. Stinson on these charges.

School Zone Enhancement

At trial, the judge read the verdict and special verdict into the record. Unfortunately, the judge misread the special verdict form as indicating that the jury did not find that Mr. Stinson sold or delivered a controlled substance within 1,000 feet of a school bus route stop. The record actually shows that the jury found that the sale of cocaine was within the school zone. Mr. Stinson contends pro se that, based on the oral reading of the verdict, the trial court erred in imposing the school zone enhancement.[1]

[1] Former RCW 69.50.435(a) provided in part that anyone who sells or delivers a controlled substance within 1,000 feet of a school bus route stop may be punished by

Because the jury specifically found that he delivered cocaine within the school zone, his contention is without merit.

Personal Restraint Petition: Sentencing

Mr. Stinson raises several sentencing issues in his consolidated personal restraint petition. Generally, a petitioner may raise new issues of constitutional or nonconstitutional magnitude on collateral attack. *In re Pers. Restraint of Davis*, 152 Wn.2d 647, 671, 101 P.3d 1 (2004). To obtain relief based on a constitutional error, the petitioner must show by a preponderance of the evidence that he or she was actually and substantially prejudiced by the error. *Id.* at 671-72. The showing of actual and substantial prejudice may be waived if the error is the kind that creates a conclusive presumption of prejudice. *Id*. at 672. Relief based on a nonconstitutional error will be considered only if the error constitutes a fundamental defect that inherently results in a miscarriage of justice. *Id.*

I. Combined period of incarceration and community custody. Citing *State v. Zavala-Reynoso*, 127 Wn. App. 119, 110 P.3d 827 (2005), Mr. Stinson first contends his sentence is invalid because the combined period of incarceration and community custody exceed the statutory maximum for his crime. In *Zavala-Reynoso*, the defendant's standard range sentence, when combined with the term of his community custody,

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imprisonment of up to twice the imprisonment authorized for the crime.

exceeded the maximum term for his crime. This court vacated the sentence and remanded for resentencing, citing RCW 9.94A.505(5), which provides in part that "a court may not impose a sentence providing for a term of confinement or community supervision, community placement, or community custody which exceeds the statutory maximum for the crime as provided in chapter 9A.20 RCW."

Mr. Stinson was convicted of delivery of a controlled substance: cocaine. Former RCW 69.50.401(a). The maximum penalty for the delivery of this Schedule II controlled substance is 10 years. RCW 69.50.206(b)(5); former RCW 69.50.401(a)(1)(i). However, because Mr. Stinson had previous convictions under chapter 69.50 RCW, his maximum penalty could be doubled pursuant to RCW 69.50.408. *State v. Clark*, 123 Wn. App. 515, 520-21, 94 P.3d 335 (2004); *State v. Mayer*, 120 Wn. App. 720, 727, 86 P.3d 217 (2004). Accordingly, the trial court had discretion to set his maximum penalty at 20 years. RCW 69.50.408; *Mayer*, 120 Wn. App. at 727. Mr. Stinson's sentence is 132 months of incarceration (including the 24-month school zone enhancement). His period of community custody is from 9 to 12 months. The combined period of incarceration and community custody is at most 144 months, which does not exceed the statutory maximum of 240 months. Accordingly, his sentence does not exceed the maximum term for his crime.

II. The trial court's finding that Mr. Stinson was on community custody when he

committed the current offense. Mr. Stinson next contends the trial court violated his Sixth Amendment right to a jury trial by judicially finding that he was on community placement when he committed the current offense.

RCW 9.94A.525(17) provides that if the current conviction is for an offense committed while the offender was on community placement, one point is added to the offender score. At sentencing, the prosecutor stated that Mr. Stinson was on community placement when he committed the current offense, and the judgment and sentence indicates that one point was added on this basis. Mr. Stinson did not dispute this fact. For the first time on appeal, he cites *State v. Jones*, 126 Wn. App. 136, 107 P.3d 755, *review granted*, 155 Wn.2d 1017 (2005) for the proposition that the factual determination whether an offender was on community placement at the time of the crime must be determined by a jury beyond a reasonable doubt.

We decline to reach this issue because even if it were error for the superior court, rather than the jury, to determine that Mr. Stinson was on community placement when he committed the current offense, he was not prejudiced. The deduction of one point from his offender score would only lower the score to 9.5. According to the "Drug Offense Sentencing Grid" found at RCW 9.94A.517, a level II offense with an offender score of 6 to 9 or more results in a sentence of 60+ to 120 months (doubled, in this case, pursuant to RCW 69.50.408 (*see* discussion in section I above)). The only other possible error in the

calculation of his offender score—the juvenile conviction discussed in section V below—would reduce his sentence by only an additional one-half point. Consequently, any error in adding the community placement point was harmless.

III. Community custody versus community placement. Mr. Stinson next contends the trial court erred in finding that he was on community placement. Although he admits he was on community custody at the time of the offense, he denies he was on community placement. Whether postrelease supervision is called community custody, community supervision, or community placement, it increases an offender score by one point under RCW 9.94A.525(17). *See State v. Reed*, 116 Wn. App. 418, 423-24, 66 P.3d 646 (2003) (citing former RCW 9.94A.030(7) (2001) (community placement means the period when the offender is subject to community custody and/or postrelease supervision)). Thus, the evidence supports the trial court's finding that Mr. Stinson was on community placement when he committed the current offense.

IV. Classification of a California conviction. Included in Mr. Stinson's criminal history is a 1991 conviction in California for the transportation or sale of a controlled substance. Mr. Stinson contends this charge was adjudicated down to a misdemeanor with a suspended sentence and should not have been treated as a felony in Washington. The State contends Mr. Stinson cannot show prejudicial error in this collateral attack on the sentence because he signed a document entitled "Understanding of Defendant's

Criminal History," wherein he stipulated that each of the offenses listed in his criminal history counts in computing his offender score. Resp't's Br. App. A.

To calculate an offender score, the sentencing court must determine the defendant's criminal history based on the prior convictions and the level of seriousness of the current offense. *State v. Ross*, 152 Wn.2d 220, 229, 95 P.3d 1225 (2004). Prior out-of-state convictions are classified according to the comparable Washington offense. *Id*. (citing RCW 9.94A.525(3)). Generally the State carries the burden to prove by a preponderance of the evidence the existence and comparability of the out-of-state convictions. *Id.* at 230. However, when a defendant affirmatively acknowledges that prior out-of-state convictions are properly included in the offender score, the burden has been met. *Id.* Although a defendant cannot waive a challenge to a legal error in the calculation of an offender score, waiver may be found when the alleged error involves a stipulation to facts or a trial court's exercise of discretion. *In re Pers. Restraint of Cadwallader*, 155 Wn.2d 867, 873-75, 123 P.3d 456 (2005); *Ross*, 152 Wn.2d at 231.

Mr. Stinson affirmatively acknowledged that the 1991 California conviction was included in his offender score as a comparable Washington felony. In doing so, he waived the factual argument that this out-of-state conviction was actually adjudicated down to a misdemeanor.

V. Juvenile adjudication. Mr. Stinson also contends a 1989 juvenile conviction

for taking a motor vehicle should not have been counted because it was dismissed and has never been included in his criminal history before. As discussed above, he affirmatively acknowledged the fact of this juvenile adjudication at sentencing. Accordingly, he waived any argument challenging that fact. *Cadwallader*, 155 Wn.2d at 875; *Ross*, 152 Wn.2d at 231. At any rate, any error in including the juvenile conviction would be harmless because the one-half point it contributed to his offender score of 10.5 did not affect the resulting sentence. *See* RCW 9.94A.510 (an offender score of nine is the top of the scale); RCW 9.94A.525(7) (if the present conviction is for a nonviolent offense, a prior nonviolent juvenile felony is counted as one-half point).

VI. Current convictions. Citing *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), Mr. Stinson contends his two other current offenses should not be counted as prior offenses because they have not yet been mandated and are subject to collateral attack within one year. RCW 9.94A.525(1) provides that convictions entered or sentenced on the same day as the conviction for which the offender score is being computed are deemed "other offenses." Accordingly, they are counted as if they are prior offenses for the purpose of the offender score. RCW 9.94A.589(1)(a). *Blakely* is not applicable to the calculation of an offender score, which is based on prior convictions, including other current convictions. *See Blakely*, 542 U.S. at 301.

VII. Counting juvenile adjudications in the offender score. Finally, Mr. Stinson

argues that juvenile adjudications are not actual convictions and therefore should not be counted in the offender score. This issue has been settled by statute and case law to the contrary. *See* RCW 9.94A.030(11) ("'Conviction' means an adjudication of guilt pursuant to Titles 10 or 13 RCW [including the Juvenile Justice Act of 1977] and includes a verdict of guilty, a finding of guilty, and acceptance of a plea of guilty"); *In re Pers. Restraint of LaChapelle*, 153 Wn.2d 1, 4-5, 100 P.3d 805 (2004).

Affirmed; personal restraint petition dismissed.

A majority of the panel has determined that this opinion will not be printed in the

Washington Appellate Reports but it will be filed for public record pursuant to RCW 2.06.040.

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Schultheis, J.

WE CONCUR:

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Sweeney, C.J. Kulik, J.